In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY, PETITIONER

v.

CAROLINA FREIGHT CARRIERS CORPORATION, FOR THE USE AND BENEFIT OF LIBERTY MUTUAL INSURANCE COMPANY

AND

OLD REPUBLIC INSURANCE COMPANY

No. 74-54

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THE SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

This memorandum is filed in response to the Court's letter of October 15, 1974, inviting the Solicitor General to express the views of the United States.

STATEMENT

In both of these cases motor carriers (lessees) certificated by the Interstate Commerce Commission have sought indemnification from the lessors of equipment utilized in performing transportation services that the lessee is authorized to perform. In each case the lessee (or its insurer) paid a claim for personal injuries allegedly caused by negligence of the driver of the leased vehicle. The drivers themselves were supplied by the lessors of the equipment. In both cases written lease agreements provided that the lessor, which furnished both equipment and driver, would indemnify the lessee for any liability incurred as a result of defects in the equipment or negligence of the driver. The lessors in both cases declined to honor the indemnification clause, contending that the clause was invalid because it conflicted with the equipment lease requirements promulgated by the Interstate Commerce Commission.

The relevant Commission regulation with respect to the lease in No. 73-1750, *Pitt County Transportation Co.* v. *Carolina Freight Carriers Corp.*, provides in pertinent part (49 C.F.R. 1057.4(a)):

> *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
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> * * * * *
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> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,* * *
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> * * * * *

The relevant Commission regulation with respect to the lease in No. 74-54, *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Systems, Inc.*, provides that the carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *." 49 C.F.R. 1057.3(a).

In *Transamerican* the Court of Appeals for the Seventh Circuit concluded that the indemnification provisions in the lease excessively diminish the lessor's control and responsibility, and therefore are inconsistent with the Commission's regulations. In *Pitt County* the Court of Appeals for the Fourth Circuit concluded that the indemnification provisions do not violate the Commission's regulations.

ARGUMENT

1. These two cases present a clear conflict among the circuits in interpreting the relevant Commission regulations.[1] Indemnity clauses are often used in equipment leases in the trucking industry, and the present controversy about their validity has created unnecessary confusion and uncertainty for the carriers affected. We therefore believe that certiorari should be granted to resolve the conflict.[2]

2. The equipment leasing regulations under consideration here were formulated in Ex Parte No. MC-43, an extended rulemaking proceeding from 1950 to 1956. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. Because only a properly certificated carrier may haul freight, those regulations—although recognizing that

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[1]There is no operative difference between the control and responsibility requirements of Sections 1057.3(a) and 1057.4(a)(4). Section 1057.4 includes additional requirements, not relevant to the indemnification controversy, from which Section 1057.3(a) exempts certain carriers.

[2]The Fifth Circuit (see *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710) also has held that indemnification clauses are permissible.

properly certificated carriers legitimately may lease motor vehicle equipment from others in order to operate to the full extent of their authorities—prevent carriers from entering into ostensible "equipment leases" under which a "lessee" with operating authority simply lends its name and its certificate to a "lessor" that actually performs the transportation service. The control and responsibility regulations forbid such arrangements, which in reality constitute illegal leasing of operating authority from the "lessee" of the equipment to the "lessor" of the equipment (*Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 360):

> In any case of a person claiming to be a motor carrier through the use of the vehicles of others, it is of the utmost importance to regulation that it have and exercise direction and control of the operations and of the persons engaged therein. For otherwise an unworkable situation is created, that is, one, for example, in which neither the Commission nor the person claiming to be the carrier would have any immediate and direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service, and the safe operation of vehicles on the highways, all of which were intended by the act. In other words, as to these important features of motor-carrier operation, our regulation thereof, as required by the act, would be negatived to an inoperative degree, as the actual operator would not be subject to our regulations or to the direction and control of the person claiming to be the carrier and subject to our jurisdiction.

Although the regulations reflect different treatment for leases of various types of equipment, they generally require that (1) the lease be in writing and provide that the

lessee assumes control and responsibility for the operation of the equipment; (2) the lessee conduct a safety inspection before taking possession of the equipment; and (3) the equipment be identified as that of the lessee. The regulations make no provision with regard to indemnification clauses and the narrow question presented here—whether the presence of such an indemnity clause in and of itself constitutes a lack of control in the lessee—was not addressed in the rulemaking proceeding.

3. The Commission believes that its regulations neither sanction nor forbid indemnification agreements. Although the regulations require the lessee to assume full "control and responsibility," the regulations do not altogether proscribe indemnity clauses. If the lessee otherwise assumes full control and acknowledges its personal liability to the injured party, it is not forbidden to seek indemnity from the lessor. The goal underlying the regulations—the prevention of leases of operating authority in the guise of leases of equipment—is not affected by indemnification agreements where other adequate indicia of control and responsibility are present.[3]

The Commission believes, however, that an indemnity clause is a factor to be considered in determining whether

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[3]In the course of the rulemaking there was some testimony regarding the indemnification of lessees by owner-operators. The Commission stated (52 M.C.C. at 690):

> Protection of the public through insurance is reduced, because certain carriers require owner-operators to bear a portion of the public-liability and property-damage insurance, and, in some instances, to assume part of the responsibility for cargo insurance and pay a portion of each loss and damage claim.

However, the Commission's comment concerned carriers (lessees) that disclaim their responsibility for damage to the public. Such a disclaimer denegrates the lessee's control and responsibility. The Commission's comment did not discuss carriers which, while acknowledging their liability, arrange to shift the ultimate loss to the lessor.

a lessee has in fact assumed the requisite control and responsibility.[4] In two Commission cases in which the lessor's insurance policy provided that the lessor would hold the lessee free from liability, the Commission held that the "control and responsibility" requirements of the regulations were not satisfied. *Tanksley Transfer Company Extension—Points in Four States*, 110 M.C.C. 674; *Diamond Transportation System, Inc., Extension — Wisconsin and Oklahoma Origins*, 117 M.C.C. 706. However, those cases involved a number of other factors tending to show a lack of control by the lessee. The Commission in each case based its conclusion upon the cumulative impact of all of these factors and not upon the indemnification provisions alone.

4. The United States believes that the present Commission regulations with respect to leased equipment have not adequately assured the safe operation of leased vehicles. The Bureau of Motor Carrier Safety, which is responsible for ensuring compliance with safety regulations,[5] has difficulty in obtaining compliance by owner-operators who lease equipment to certificated carriers.

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[4]The clauses involved in this case provide for indemnification only of damage proximately caused by the negligence of a driver provided by the lessor or by defects in the lessor's equipment. On the other hand, a clause providing for indemnity for harm caused by conditions created by the lessee, or by conditions that the lessee should have detected and cured in the course of adhering to the Commission's inspection regulations, might by itself show that the lessee has failed to assume the requisite control and responsibility.

[5]The Commission's duties relating to motor carrier safety were transferred to the Department of Transportation under Section 6(e) of the Department of Transportation Act, 49 U.S.C. 1655(e), and have been delegated to the Bureau of Motor Carrier Safety of the Federal Highway Administration, 49 C.F.R. 1.48, 389.4. However, the Com-

The United States believes that appropriately drafted regulation of indemnification clauses would be desirable as a matter of policy and that the Commission has power to adopt such regulations under 49 U.S.C. 304(e). Such regulation might provide regulated carriers with a greater economic incentive to refuse to lease unsafe equipment or to implement preventive maintenance programs; as a consequence owner-operators would have a greater incentive to perform adequate maintenance in order to obtain leases. However, the United States believes that the present Commission rules cannot appropriately be interpreted as prohibiting lease provisions which require the lessor to indemnify the lessee for liability claims from members of the general public.

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mission retains authority to promulgate rules with respect to the terms of equipment leases pursuant to 49 U.S.C. 304(e).

The Commission has never formally considered the effects an indemnity clause might have either on the care with which leased equipment is operated or on the dispatch with which injury and damage claims are paid. However, in promulgating the leased-equipment regulations the Commission expressly adopted other measures, including the inspection requirement, for the purpose of ensuring that leased equipment would be operated safely.

CONCLUSION

For the reasons stated the petitions for writs of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1975.